[Cite as *In re M.C.*, 2010-Ohio-1360.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

In the Matter of: M.C., L.C.

Court of Appeals No. L-09-1271

Trial Court No. JC 07-167225

DECISION AND JUDGMENT

Decided: March 31, 2010

* * * * *

Tim A. Dugan, for appellant.

Bruce D. McLaughlin, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from the September 28, 2009 judgment of the Lucas County Court of Common Pleas, Juvenile Division, which terminated appellant, J.C.'s, and N.C.'s parental rights and awarded permanent custody of appellant's minor children,

M.C. and L.C., to Lucas County Children's Services ("LCCS"). For the following reasons, we affirm the trial court's judgment.

{¶ 2} Appellant, J.C., is the natural father of M.C., born August 2000, and L.C., born June 2002.[1] On April 6, 2007, LCCS filed a complaint in dependency and neglect and motion for shelter care hearing. The complaint alleged that in October 2005, appellant's family came to LCCS' attention through LCCS' involvement with appellant's girlfriend and her children who were living in appellant's home. The girlfriend's minor daughter had a "suspicious physical injury" and other medical concerns. Appellant's home was in disrepair and its condition was "very poor with food and garbage strewn about." The complaint further alleged that there were parenting issues including the appropriate discipline and supervision. At that time, LCCS opened the case to provide services to the family.

{¶ 3} According to the complaint, the incident that precipitated LCCS filing the complaint occurred on April 4, 2007. On that date, at 6:05 p.m., M.C. called 911 and stated that the children (her sister and the girlfriend's two young children) had been left home alone. The Toledo Police arrived at approximately 6:30 p.m. and the parents returned at 6:50 p.m. The complaint alleged that M.C. (then six and a half and the oldest) babysat the children a lot and was told that she could "whoop" the children if they did not listen. M.C. stated that the girlfriend whoops them with a belt if they are bad.

[1]The children's mother, N.C., is not a party to this appeal.

{¶ 4} Finally, the complaint states that the children's mother resides in North Carolina, has been in telephone contact with LCCS and the children, but that her address was unknown. The complaint stated that LCCS did not believe that the mother provided any support for the children.

{¶ 5} On April 10, 2007, following the shelter care hearing, temporary custody of M.C. and L.C. was awarded to LCCS. The children were placed in a foster home. The April 11, 2007 case plan had a goal of reunification and required that appellant attend parenting classes, obtain a mental health assessment, and keep his home clean and sanitary. On April 13, 2007, Dr. Ernest Brookfield was appointed as the Guardian Ad Litem ("GAL") for M.C. and L.C. On May 7, 2007, appellant agreed to an adjudicatory finding of dependency and neglect; the finding was journalized on June 4, 2007.

{¶ 6} On April 2, 2008, the magistrate found that appellant had substantially completed the LCCS case plan services and custody of M.C. and L.C. was returned. On June 3, 2008, LCCS filed a motion to change disposition and for shelter care hearing. The motion stemmed from an incident on June 1, 2008, where the family was at a party and appellant was drinking heavily. Appellant had given his car keys to someone and told them not to let him drive if he was intoxicated; the individual locked the keys in appellant's car. Appellant demanded his keys back and was refused. Appellant became irate and broke the window of his car in order to retrieve them. The police were called and appellant had to be tasered into submission. The children witnessed the incident. LCCS again received temporary custody of M.C. and L.C.

{¶ 7} On June 13, 2008, an amended case plan was filed. Appellant was referred for mental health and drug and alcohol assessments and domestic violence treatment. Appellant complied with the case plan.

{¶ 8} On March 25, 2009, LCCS filed a motion for permanent custody pursuant to R.C. 2151.414. In its motion, LCCS stated that appellant and his girlfriend were still in a relationship and that the girlfriend had lost her housing and was residing in appellant's home. She had been taking her children, also in temporary custody of LCCS, to appellant's home for visitation. There had been allegations of yelling and arguing between appellant and the girlfriend and the police had been called. Further, M.C. stated that she was afraid of the girlfriend and did not want to live with appellant if she is there. The girlfriend admitted to "beating" M.C. when she walked away with a stranger. The caseworker indicated that when appellant and the girlfriend are together their lives are "chaotic and dangerous."

{¶ 9} LCCS further stated that the LCCS' caseworker had recently visited the home and found it to be in very poor condition with trash, tools, dirty laundry, and dirty dishes "strewn throughout the home." M.C.'s and L.C.'s mother had not been approved for placement of the children and had sporadic telephone contact with them.

{¶ 10} LCCS concluded that appellant had failed to remedy the conditions which caused the initial removal of the children despite reasonable efforts of the agency. LCCS further stated that it believed that it was in the children's best interests to permanently terminate appellant's and the mother's parental rights.

{¶ 11} On August 21, 2009, a hearing has held on the motion and the following testimony was presented. Foster mother, P.B., testified that she has been a foster parent to the children for two and one-half years. P.B. also foster parented the girlfriend's two young children. P.B. testified that when M.C. was placed in her home she was "very scared" due to things that had happened at home. P.B. testified that L.C. was developmentally delayed, was in a special education class, and was taking ADHD medication; P.B. stated that appellant did not want to address these issues. P.B. also stated that the children had very high lead levels from living in appellant's home.

{¶ 12} Regarding the children's behavior, P.B. testified that when they were initially placed in her home they had no manners, they were afraid a lot, and L.C. was masturbating. The children were referred to counseling and, since they have been in her home, P.B. stated that the children's behavior improved "100 percent."

{¶ 13} P.B. testified that after appellant and the children were reunified, the girlfriend called and told her that appellant had been tasered in front of the children. P.B. went and got the children.

{¶ 14} P.B. testified that in the summer of 2009, a reunification plan was in place and the children began having visits at appellant's home. P.B. stated that the arrangement was that the girlfriend (whose children were still with P.B.) would pick her children up for visitation and take them to her home and P.B. would deliver appellant's children to his home. P.B. recounted an incident where the girlfriend failed to pick up her children and P.B. drove M.C. and L.C. to appellant's house. P.B. stated that the girlfriend was at

appellant's house and she was upset with appellant because he would not help her fix the van. The girlfriend threatened to call the police. When P.B. returned to pick up the children they told her that the police had been there.

{¶ 15} During cross-examination, P.B. admitted that the children expressed their preference to live with appellant. With regard to the children's mother, P.B. testified that she did visit once and that her telephone calls are very inconsistent. During redirect examination, P.B. clarified that the children did not wish to live with appellant if the girlfriend was there.

{¶ 16} LCCS caseworker, Marco Quimbaya, testified next. Quimbaya testified that he became involved with the family in November 2005, when the case was initially opened. Quimbaya stated that the case was opened with appellant's girlfriend's case. There were concerns that the girlfriend physically abused her children. Appellant's case was opened due to parenting concerns and home conditions. Quimbaya testified that he visited the home every month and observed trash, clothing, and clutter all throughout the house. He also observed tools, including box cutters, laying around and exposed electrical wiring. Quimbaya stated that he had to continuously remind appellant and his girlfriend to clean up the home. Quimbaya stated that attempts at cleaning were made but that the home would revert back to its prior condition.

{¶ 17} Quimbaya testified that following the April 2007 removal of the children, appellant was referred for a drug and alcohol assessment and a mental health assessment. It was recommended that appellant attend an educational drug treatment class for alcohol.

As the case proceeded, domestic violence counseling was added. According to Quimbaya, appellant was initially very hostile regarding the domestic violence counseling but that he successfully completed it.

{¶ 18} After appellant successfully completed the required programs and had informed Quimbaya that the girlfriend was not living in the home, LCCS filed a motion to reunify the family on February 15, 2008. The family was reunified in April.

{¶ 19} According to Quimbaya, appellant was informed that he could not leave the children unsupervised with the girlfriend. The girlfriend was also not to be living in his home. Appellant agreed to these conditions.

{¶ 20} Quimbaya testified that in June 2008, he received a call that appellant was intoxicated at a party and was angry because his friend would not give him his car keys. An argument ensued and the police were called. The children witnessed the incident. Following the incident, the children were returned to foster care. Appellant was again referred for various services. Quimbaya testified that appellant was very cooperative and the home was being maintained. Quimbaya stated that in September 2008, he was going to recommend reunification.

{¶ 21} Prior to a second reunification, Quimbaya was notified that appellant was arrested following an altercation at a bar/restaurant. Appellant was charged with aggravated menacing. Appellant was then referred to an intensive outpatient alcohol program. Quimbaya stated that from September 2008 through January or February 2009, appellant was doing quite well.

{¶ 22} Quimbaya testified that home visits recommenced in February 2009. Quimbaya stated that, in contravention of their agreement, he had received word that the girlfriend was in the home during the visits. The children reported to their foster mother that appellant and the girlfriend had been arguing and that the police had been called and responded.

{¶ 23} After hearing reports that the girlfriend had been in the home, Quimbaya made a home visit in March 2009. Quimbaya stated that the home was filthy with garbage strewn about and there were building materials and tools lying around. Appellant acknowledged that the girlfriend was bringing her children to his home and that he allowed it.

{¶ 24} Quimbaya testified that appellant completed the intensive outpatient alcohol program in April 2009, and the after care service on May 20, 2009. Quimbaya stated that appellant failed to continue with recommended individual counseling, AA meetings, and to provide random urine samples.

{¶ 25} Quimbaya testified that at the March 2009 staffing, LCCS informed appellant this it was recommending permanent custody to the agency because the girlfriend was in the home, that she abused his children, and that appellant was not being truthful about the living situation. Appellant became very angry and ripped up the paperwork being passed to the foster mother, threw the case file on the floor and stomped on it and then walked out. Quimbaya further stated that the girlfriend said that if she had

a gun she would kill him. Following these incidents, Quimbaya did not make any additional home visits because he did not feel safe.

{¶ 26} Finally, Quimbaya stated that the children were doing very well in foster care. The foster mother has control over the children and they respect her. Quimbaya testified that he recommends that LCCS get permanent custody of the children because appellant and their mother have not remedied the situation that caused their removal from the home. Quimbaya testified that appellant's brother, who lives in North Carolina, was being considered for adoptive placement of the children.

{¶ 27} During cross-examination, Quimbaya acknowledged appellant's compliance with various programs that he was referred to. Appellant was also consistent with visitation. Quimbaya acknowledged that LCCS' requests regarding the girlfriend were not in the case plan. Quimbaya also acknowledged that appellant loves his children and they love him but that he has no control over them.

{¶ 28} Quimbaya was again asked why he felt that it was in the children's best interests to terminate appellant's and the mother's parental rights. Quimbaya stated that he had worked with the family for over four years and that, although appellant completed the required services, he did not follow through with the rest of the recommendations. Further, permanent custody was in the children's best interests because the children were afraid of appellant's girlfriend and he was unwilling to remove her from the home. Finally, Quimbaya stated that the children needed a permanent plan.

{¶ 29} Douglas Scott Beinick, of Unison Behavioral Health Group, testified that he is an alcohol and drug treatment counselor. Beinick testified that approximately a year and one-half ago appellant was referred to him by LCCS. Appellant attended the six-week alcohol education program, and met individually with Beinick. A few months after completing the program, appellant was again referred to Beinick and was placed in the intensive outpatient program; the program was for six weeks with 12 weeks of aftercare. Appellant was diagnosed with alcohol dependence. Beinick testified that appellant completed the program in May 2009. It was recommended that appellant continue to provide random urine screens, attend three AA meetings per week, and meet with Beinick on a regular basis. Appellant did not comply with the recommendations.

{¶ 30} The children's GAL, Ernest Brookfield, M.D., testified next. Dr. Brookfield testified that the older child, M.C, stated in order of preference that she would like to return to her family in North Carolina, would like to stay with her father, or would stay in her foster home. M.C. was very hesitant to return to appellant if the girlfriend was in the home; though, M.C. did note that the girlfriend had recently been better. Dr. Brookfield stated that his recommendation was that LCCS receive permanent custody. Brookfield stated that the recommendation was based upon the parents' inability to remedy the problems and the children's need for permanency.

{¶ 31} During cross-examination, the mother's attorney questioned Dr. Brookfield regarding his recommendation; Brookfield acknowledged that his recommendation was not aligned with what M.C.'s wishes were. At that point, the mother's attorney stated that

he felt, because the GAL's and M.C.'s wishes were not aligned, then the children should have an attorney. The court stated that M.C. wanted to be with appellant if the girlfriend was not there and that this was not inconsistent with the GAL's recommendation. Thus, the court felt that an attorney for the children was not necessary.

{¶ 32} On September 28, 2009, the trial court granted LCCS' motion for permanent custody. The court concluded that, pursuant to R.C. 2151.414(B), M.C. and L.C. have been in LCCS' custody for 12 or more months of a consecutive 22 month period and that the children cannot be reunified with either parent within a reasonable amount of time. The court further found that, under R.C. 2151.414(D), it was in the children's best interests to award permanent custody to LCCS. Under R.C. 2151.414(E), the court specifically found that LCCS offered case plans services and made diligent efforts to assist the parents, R.C. 2151.414(E)(1), and that the parents had demonstrated a lack of commitment to the children, R.C. 2151.414(E)(4).

{¶ 33} Appellant now appeals and sets forth the following two assignments of error:

{¶ 34} "1.) The juvenile court erred by not appointing counsel to M.C. and L.C. where the original Dependency and Neglect complaint alleged abuse on its face.

{¶ 35} "2.) The juvenile court's decision to terminate the parental rights of J.C. was against the manifest weight of the evidence."

{¶ 36} In appellant's first assignment of error, he contends that because the complaint contained allegations of abuse, an attorney was required to be appointed for the

children under Juv.R. 4(A). Appellant further argues that because the GAL's and the children's wishes conflicted, the court was required to appoint an attorney to represent the children. Conversely, LCCS asserts that because the complaint in this case did not allege abuse, it alleged dependency and neglect, the court was not required to appoint an attorney for the children.

{¶ 37} Juv.R. 4(A) provides:

{¶ 38} "A) Assistance of counsel

{¶ 39} "Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute."

{¶ 40} Further, R.C. 2151.352 provides:

{¶ 41} "A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. * * *. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them."

{¶ 42} In support of his argument, appellant relies on this court's case captioned *In re Stacey S.*, 136 Ohio App.3d 503, 1999-Ohio-989. In *Stacey S.*, we considered whether, in order for the children to be entitled to an attorney, a complaint must specifically seek an adjudication of abuse. The complaint in that case was in dependency and neglect but included, inter alia, claims regarding "the 'suspicious * * * nature' of Rachel's injuries" and that "one of the children had a genital abnormality which, 'could be consistent with sexual abuse.'" Id. at 507.

{¶ 43} Upon review of the complaint in this case, we find that LCCS did not allege abuse; thus, Juv.R. 4(A) is not applicable. The complaint did state that there were issues regarding "appropriate discipline and supervision" of the children; however, unlike *Stacey S.*, there were no actual allegations that appellant's children had been physically or sexually abused.

{¶ 44} Appellant further contends that because there was a conflict between the GAL's recommendation and the wishes of M.C., that, pursuant to *In re Williams*, 101 Ohio St.3d 398, 2004-Ohio-1500, an attorney should have been appointed to represent the children.

{¶ 45} In *Williams*, the Supreme Court of Ohio held that a child who is the subject of a juvenile court proceeding to terminate parental rights is a party to that proceeding and, in certain circumstances, is entitled to independent counsel. Id. at syllabus. The *Williams* court did not specify what circumstances would trigger a juvenile court's duty to appoint counsel; it stated that such a determination should be made on a case-by-case

basis. Id. at ¶ 17. However, the *Williams* facts do offer guidance on when appointment of counsel is necessary.

{¶ 46} In *Williams*, [M.], age six on the date of the permanent custody hearing, "repeatedly expressed a desire to remain with his mother" and the GAL recommended that the agency's motion for permanent custody be granted. Id. at ¶ 5. The appeals court in *Williams* further stated that [M.] "consistently expressed this desire to be reunited with [his mother.]" *In re Williams*, 11th Dist. Nos. 2002-G-2454, 2002-G-2459, 2002-Ohio-6588, ¶ 20; and "[M.] did not want to let [his mother] out of his sight." Id. at ¶ 9.

{¶ 47} In the present case, at the August 21, 2009 permanency hearing, the GAL testified that M.C., then age nine, expressed in order of preference that she wanted to live with her family in North Carolina, that she wanted to live with her father (although she was very hesitant due to the girlfriend being in the home), and that remaining in foster care was her final choice. The GAL recommended that LCCS receive permanent custody. At that point, the mother's attorney raised the issue of the need to appoint an attorney to represent the children due to the conflicting viewpoints of the GAL and M.C. The trial court dismissed the request noting:

{¶ 48} "[T]hat her wishes were not inconsistent with that, but that she would want to be with her dad. At one point she would want to be with her did if [the girlfriend] is not in the picture; then, if so, then to a relative.

{¶ 49} "So I don't think that it's inconsistent. I think it's very clear she would like to live with her dad and with that caveat, which is consistent with what everyone has been saying all along. So if that was a request for continuance, I'm going to deny that."

{¶ 50} Further, in the trial court's September 28, 2009 judgment entry, the court noted:

{¶ 51} "The Court had considered the wishes of the children as expressed by [M.C.] to the Guardian ad Litem with due regard for the maturity and the age of the children. The Court finds that each of the children has indicated a love for their father, and a conditional desire to live with him, i.e., they do not want to live with him if [the girlfriend] is present. [M.C.] has also expressed a desire to be with family in North Carolina; or, to reside with the foster parent."

{¶ 52} Looking at the specific facts of this case, we cannot say that the trial court erred when it failed to appoint an attorney to represent the children. M.C. expressed a desire to reside with her father, but also expressed fear of living there with the girlfriend. M.C. also expressed a desire to live in North Carolina with family. Based on the foregoing, we do not find that the desires of M.C. and the recommendations of the GAL conflicted to the extent that an attorney was required to represent the children's wishes. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 53} In his second assignment of error, appellant contends that the trial court's judgment granting permanent custody to LCCS was against the manifest weight of the evidence. Appellant asserts that he has taken significant steps toward remedying the

problems that caused the children's removal, i.e., he has substantially complied with the case plan. Further, appellant argues that LCCS failed to prove that his relationship with the girlfriend has prevented him from providing a safe environment for his children.

{¶ 54} As set forth above, the testimony presented at the hearing demonstrated that the LCCS' case for the family was initially opened in 2005. At that time, the referral was made due to poor housing conditions and parenting issues. Appellant's girlfriend was living in the home with her two young children. The LCCS caseworker made monthly visits to the home; home conditions would improve for a short period and then deteriorate again. In 2007, the children were removed from appellant's home after being left alone; appellant and his girlfriend left M.C., then age six and the oldest of the four children, in charge.

{¶ 55} Appellant did progress well with the case plan; however, there continued to be incidents involving alcohol abuse and violence. Further, in March 2009, the caseworker visited appellant's home and found the condition deplorable; there was garbage, tools and construction materials strewn throughout the home. Finally, the children had repeatedly expressed their fear of the girlfriend, yet appellant continued to have her in the home.

{¶ 56} Based on the foregoing, we find that the evidence clearly and convincingly supports the trial court's findings that the children cannot or should not be placed with appellant and that permanent custody to LCCS is in their best interests. Appellant's second assignment of error is not well-taken.

{¶ 57} On consideration whereof, we find that substantial justice was done the party complaining, and the judgment of the Lucas County Court of Common Pleas, Juvenile Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE